

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SUHAIL NAJIM ABDULLAH AL SHIMARI,)	
<u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	
CACI PREMIER TECHNOLOGY, INC.,)	1:08-cv-827 (LMB/JFA)
)	
Defendant/Third-Party Plaintiff,)	
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Third-Party Defendant.)	

ORDER

Before the Court is defendant CACI Premier Technology, Inc.’s Notice of Interlocutory Appeal [Dkt. No. 1253], informing the Court that it has appealed this Court’s denial of derivative sovereign immunity to the Fourth Circuit Court of Appeals. CACI argues that a non-frivolous appeal from an order denying a claim of immunity divests this Court of jurisdiction to proceed. Plaintiffs have filed a Motion to Certify Defendant’s Appeal as Frivolous [Dkt. No. 1267], which CACI has opposed [Dkt. No. 1288].

Only when a district court is faced with a “sham” or “baseless” appeal may it “certify to the court of appeals that the appeal is frivolous and get on with the trial.” Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989) (citations omitted). Courts have defined “frivolous” actions as those in which “realistic chances of ultimate success are slight” or in which the legal points are not “arguable on their merits.” See, e.g., Death Row Prisoners of Pa. v. Ridge, 948 F. Supp. 1282, 1286 (E.D. Pa. 1996) (internal quotation marks omitted) (collecting cases). “In order for an

interlocutory appeal to be deemed frivolous, it must be both meritless and substantively inappropriate.” Eckert Int’l, Inc. v. Gov’t of Sovereign Democratic Republic of Fiji, 834 F. Supp. 167, 174 (E.D. Va. 1993) (citing United States v. Head, 697 F.2d 1200, 1204–05 (4th Cir. 1982)). CACI’s interlocutory appeal is neither. The power to certify an appeal as frivolous “must be used with restraint,” Apostol, 870 F.2d at 1339, and it cannot be utilized here. As the Court noted in its Memorandum Opinion, the question of whether the United States retains sovereign immunity for jus cogens violations was one of first impression. The Court cannot in good faith call an appeal of an unprecedented legal ruling frivolous. In addition, on April 2, 2019, the Fourth Circuit issued an accelerated briefing schedule for this interlocutory appeal, which signals to the Court that the Fourth Circuit considers it worthy of consideration, rather than frivolous.¹ Accordingly, it is hereby

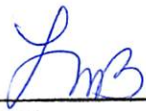
ORDERED that plaintiffs’ Motion to Certify Defendant’s Appeal as Frivolous be and is DENIED, and that the parties’ Motions in Limine [Dkt. Nos. 1188, 1194, 1198, 1205, 1218, and 1225] and plaintiffs’ Motion for a Written Jury Questionnaire [Dkt. No. 1211] be and are HELD IN ABEYANCE until the interlocutory appeal is resolved; and it is further

ORDERED that the oral argument currently scheduled for Friday, April 5, 2019 and the jury trial currently scheduled for Tuesday, April 23, 2019 be and are CANCELLED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 3rd day of April, 2019.

Alexandria, Virginia

/s/ 
 Leonie M. Brinkema
 United States District Judge

¹ Although the briefing schedule is accelerated, its dates extend beyond that of the trial. Accordingly, the trial must be cancelled.